LIM NYOOK YIN

v.

ULTRATECH SDN BHD. & ANOR.

HIGH COURT MALAYA, TAIPING
DATO' HJ. ABDUL MALIK BIN HJ. ISHAK J.
[CIVIL SUIT NO. 22-43-94]
12 OCTOBER 1994

INJUNCTION: *Life span of ex-parte interim injunction - Two weeks - Whether O. 29 r. 2B of Rules of the High Court 1980 is a mandatory provision - Return date - Whether Court has power to set a return date for an inter partes hearing - Order 92 r. 4 RHC 1980 - Effect of words "unless sooner revoked or set aside".*

In this case, the plaintiff obtained an *ex-parte* interim injunction pursuant to O. 29 (2B) of the Rules of the High Court 1980 restraining both the defendants from removing timber logs extracted from the designated area. At the instance of the plaintiff's Counsel, the return date was given for an *inter partes* hearing. On the date fixed for hearing of the *inter partes* application of the *ex-parte* interim injunction, Counsel on behalf of the first defendant raised a preliminary objection *inter alia* to the effect that there no provision under O. 29 r. 2B of the RHC 1980 for the return date to be given before the expiry of the two weeks.

Held:

[1] The words appearing in O. 29 r. 2B of the Rules of High Court 1980 especially the expression "unless sooner revoked or set aside" would by itself give the power to Court to set a return date for an *inter partes* hearing.

[2] In the *inter partes* hearing, the Court has an inherent power under O. 92 r. 4 of the Rules of the High Court 1980 to extend the ex-parte interim injunction until the disposal of the main suit.

[3] There is no bar under the inherent power of the Court to order a return date in an application under O. 29 r. 2B of the Rules of the High Court 1980 as this is the best possible way to resolve the *ex-parte* interim injunction.

[Preliminary objection rejected].

Cases referred to:

Bates v. Lord Hailsham of St. Marylebone [1972] 3 ALL ER 1019 ***(refd)***
Shobri bin Hasan v. R.S. Ramalingam a/l Subramaniam [1993] 1 AMR 16:636, [1993] 3 CLJ 70, [1993] 1 MLJ 263 ***(refd)***
Transport Amalgamated Pty Ltd. v. AAA Transport Services Pty Ltd. [1975] WAR 101 at 102-103 (W.A.SC) ***(refd)***
Christie Sands Pty Ltd. v. City of Tea Tree Gully [1975] 11 SASR at 262-263 (SA SC) ***(refd)***
Ex p Hinds re Penboss [1972] 2 NSWLR 542 ***(refd)***
Sheffield City Council v. Graingers Wines Ltd. [1977] 1 WLR 1119 ***(refd)***
Coutts v. Commonwealth of Australia [1985] 157 CLR 91 ***(refd)***
Hatton v. Beaumont [1977] 2 NSWLR 211 ***(refd)***
Taite v. Hurle [1967] 13 LGRA 412 ***(refd)***
Tan Kim Seng v. Tan Kim San [1994] 3 CLJ 671 ***(refd)***
Castle Fitness Consultancy Pte Ltd. v. Manz [1990] 1 MLJ 141 ***(refd)***
Pickwick International Inc. (GB) Ltd. v. Multiple Sound Distributors Ltd. [1972] 3 ALL ER 384 ***(refd)***
Metalock Marine Construction Pte Ltd. v. Kelvinside Ltd. [1985] 2 MLJ 9 ***(refd)***

Legislation referred to:
Rules of the High Court 1980 O. 29 r. (2B)

For the plaintiff - A. Selvanathan; M/s. Kean Chye & Sivalingam
For the first defendant - S. Guna; M/s. Nazri Aziz & Wong
Second defendant in person

JUDGMENT

Hj. Abdul Malik b. Hj. Ishak J:

Timber concessions were granted to the first defendant in an area known as Dalam Air Tasik Temenggor, Daerah Hulu Perak ("the designated area") and being impecunious the first defendant entered into an agreement with the plaintiff on 19 February 1994 wherein the latter agreed to buy all the timber logs extracted from the designated area. Under the agreement, the plaintiff advanced RM432,000 to the first defendant to enable the latter to commence extraction of the timber logs at the designated area. The money advanced by the plaintiff came from Rencovest Sdn. Bhd. of which the plaintiff was the Managing Director and the majority shareholder. On the sly, the cunning first defendant entered into another agreement dated 8 August 1994 with the second defendant for the sale of all the timber logs extracted from the designated area. As a matter of urgency and feeling threatened, the plaintiff applied for an *ex-parte* interim injunction. This was perfectly a legitimate course of action as Megarry J. said in *Bates v. Lord Hailsham of St. Marylebone* [1972] 3 ALL ER 1019 that "*Ex-parte* injunctions are for cases of real urgency, where there has been a true impossibility of giving notice of motion." In due course, on 8 September 1994, I granted an *ex-parte* interim injunction restraining both the defendants from removing timber logs extracted from the designated area and at the instance of the plaintiff's Counsel, the return date was accordingly fixed on 21 September 1994.

Order 29 r. (2B) of the Rules of the High Court, 1980 ("RHC") which came into effect on 2 November 1993 *vide* P.U.(A) 364/93 states as follows:

> Unless sooner revoked or set aside, an interim injunction obtained on an *ex-parte* application shall automatically lapse at the end of two weeks from the date on which it is granted.

Miss S. Guna submits on behalf of the first defendant and raises a preliminary objection to the effect that there is no provision under O. 29 r. 2B of the RHC for the return date to be given before the expiry of the two weeks and if the plaintiff wants the matter to be heard *interpartes*, enclosure 1A (referring to the *ex-parte* application for an interim injunction) should be served on the defendants. She submits forcefully that the life span of an *ex-parte* interim injunction is only for two weeks and since there is no provision for an extension of the life span of an *ex-parte* interim injunction, it follows therefore that O. 29 r. (2B) of the RHC is a mandatory provision.

On the other side of the fence, Mr. A. Selvanathan submits on behalf of the plaintiff that the words appearing in O. 29 r. (2B) of the RHC especially the words: "Unless sooner revoked or set aside" reflect the need for a return date to be given so as to enable the other side to come to Court and argue it out.

The Rules Committee in its wisdom makes O. 29 r. 2B of the RHC giving it statutory flavour (*Shobri bin Hasan v. R. S. Ramalingam a/l Subramaniam* [1993] 1 AMR 16: 636, [1993] 3 CLJ 70, [1993] 1 MLJ 263 and the language employed therein lays down a procedure to be followed, especially in regard to time. Provisions with respect to time are always mandatory unless the Court is given a power of extending the relevant time limit (*Transport Amalgam-*

ated Pty Ltd. v. AAA Transport Services Pty Ltd. [1975] WAR 101 at 102-103 *(W.A. SC) and Christie Sands Pty Ltd. v. City of Tea Tree Gully* [1975] 11 SASR 255 at 262-263 (SA SC)). Being procedural in nature, they are said to be usually or *prima facie* mandatory in character. It is said also that a mandatory requirement has to be obeyed exactly whereas a directory requirement is to be obeyed substantially (see for Instance *Ex p Hinds re Penboss* [1972] 2 NSWLR 542 at 552). It goes without saying and it is frequently said that to determine whether the words employed are to be treated as mandatory or directory one must not forget the advice of Lord Denning M.R. in *Sheffield City Council v. Graingers Wines Ltd.* [1977] 1 WLR 1119 at page 1122 to the effect that "it is always a matter of impression."

The word "shall" appearing in O. 29 r. 2B of the RHC is of course, *prima facie* mandatory (*Coutts v. Commonwealth of Australia* [1985] 157 CLR 91 at 111-112) but the problem is this: the mere use of the word "shall" is not in itself enough to resolve the question (*Hatton v. Beaumont* [1977] 2 NSWLR 211 at 222). There is an authority for the proposition that a provision containing the word "shall" has been held not to be mandatory (*Taite v. Hurle* [1967] 13 LGRA 412 at 413 (Tas S.C.)).

In my judgment, time is mandatorily set out in O. 29 r. 2B of the RHC and the Court has no power to extend time. Thus, an interim injunction granted *ex-parte* would lapse after two weeks in the absence of any application to revoke it or to set it aside (*Tan Kim Seng v. Tan Kim San* [1994] 3 CLJ 671). It is quite obvious that O. 29 r. 2B of the RHC is inserted to curtail the life span of an *ex-parte* interim injunction. The plaintiff in this case is not obliged to inform the defendants of the *ex-parte* application that came up for hearing on 8 September 1994 but he may if he wants to. There is no evidence here but if the plaintiff knows that the defendants are represented by Counsel, then the defendants' Counsel should be notified of the *ex-parte* application unless secrecy is essential (*Castle Fitness Consultancy Pte Ltd. v. Manz* [1990] 1 MLJ 141). Now, if the defendants are informed by the plaintiff or if they learn of the *ex-parte* application themselves, they may choose to attend the hearing in chambers and, in this context, the defendants have an inherent right to be present even though it is an *ex-parte* hearing. If the defendants attend, they are entitled to remain silent and take no part in the proceedings. Consequently, if the *ex-parte* interim injunction is granted in their presence, they may immediately move *ex-parte* to discharge or vary that injunction. The defendants may also take an active part in the *ex-parte* hearing of the plaintiff's application on 8 September 1994 instead of remaining silent provided they were informed earlier and if this were to happen the hearing will become an "opposed *ex-parte* application" (*Castle Fitness Consultancy Pte. Ltd. v. Manz (supra)* and *Pickwick International Inc. (GB) Ltd. v. Multiple Sound Distributors Ltd.* [1972] 3 ALL ER 384).

The proposition that Mr. A. Selvanathan has no right to apply for a return date whilst making an *ex-parte* interim injunction under O. 29 r. 2B of the RHC and, consequently, the Court has no power to fix a return date are entirely without merit. The words as suggested by Mr. A. Selvanathan appearing in O. 29 r. 2B of the RHC especially the expression "Unless sooner revoked or set aside" would by itself give the power to the Court to set a return date for an *interpartes* hearing. This is the best way for the defendants to revoke or set aside the *ex-parte* interim injunction before the expiry of two weeks. Prior to the insertion of r. 2B in O. 29 of the RHC *(vide* P.U.(A)364/93, 2 November 1993) the practice was either to grant an *ex-parte* interim injunction without giving the return date or to grant an *ex-parte* interim injunction with a return date. Put in another way, an interim injunction may be granted *ex-part*e until the return date for an *inter partes* hearing (see *Metalock Marine Construction Pte Ltd. v. Kelvinside L*td. [1985] 2 MLJ 9 where it was stated that without a return date, the interim injunction that was granted does not comply with the usual form of an *ex-parte* in-

terim injunction and would appear to be defective). Alternatively, a Judge may refuse to grant relief during the *ex-parte* application and direct that the matter be dealt with *interpartes.* Now, with the insertion of r. 2B to O. 29 of the RHC, the Rules Committee must have intended that all *ex-parte* interim injunctions be valid for two weeks and return dates be given forthwith preferably before the expiry of the two weeks to enable the matter to be argued fully. It must also be pointed out that in the *interpartes* hearing, the *ex-parte* interim injunction may be further extended *interpartes* until the disposal of the main suit. That the Court has such an inherent power to make such an order is beyond dispute (see O. 92 r. 4 of the RHC).

For the foregoing reasons, I ruled that there is no bar under the inherent power of the Court to order a return date in an application under O. 29 r. 2B of the RHC as this is the best possible way to resolve the *ex-parte* interim injunction. If the return date is not given, the opposing party would not be in a position to revoke or set aside the *ex-parte* interim injunction. Accordingly, I have no options but to reject the preliminary objections forthwith.

In the meantime, I am told by the parties that the matter had been amicably settled and the plaintiff was in the process of withdrawing the civil suit and both parties craved leave for the matter to be struck out without any order as to costs and an order to that effect was accordingly made by me. A happy ending to an unhappy episode.